BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
Petitions for Declaratory Ruling	)	CC Docket No. 98-62
of Sprint Communications Company, L.P.,	)	
Ameritech Corporation, U S WEST	)	
Corporation	)	

REPLY COMMENTS AND OPPOSITION OF SPRINT COMMUNICATIONS COMPANY, L.P.

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Sprint Communications Company, L.P. ("Sprint"), by its attorneys, hereby files its reply comments in support of the above-captioned Sprint petition for declaratory ruling and its opposition to the above-captioned petitions for declaratory ruling of Ameritech and U S West.[1] The initial comments submitted by parties other than the BOCs in response to Sprint's Petition clearly demonstrate that Ameritech's "teaming" agreement with Qwest, as well as the similar agreement between U S WEST and Qwest, involve the BOCs in marketing activities that constitute the provision of interLATA services. The contracts (like the RFP that led to the Ameritech-Qwest contract) violate Section 271 and are wholly inconsistent with the equal access and non-discrimination obligations imposed on the BOCs pursuant to Section 251(g).

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1 The Common Carrier Bureau has consolidated the Ameritech and U S West petitions with the Sprint petition proceeding. See "Common Carrier Bureau Consolidates Ameritech's and U S WEST's Petitions For Declaratory Ruling Into Single Proceeding With Sprint's Petition For Declaratory Ruling," Public Notice, DA 98-1183 (rel. June 18, 1998).

INTRODUCTION AND SUMMARY

The so-called teaming agreements at issue in this consolidated proceeding represent yet another attempt by the BOCs to find support through a literalist interpretation of the sometimes ambiguous terms of the 1996 Act for a proposition completely at odds with the overall goals of the 1996 Act. The goal of Section 271 is to prohibit BOCs from competing (in the fullest sense of the term) in the in-region interLATA market until their local monopolies have been eliminated. Premature interLATA entry will undermine the policies behind Section 271 by reducing the BOCs' incentive to cooperate in opening the local market. Further, premature interLATA entry will give the BOCs the incentive to discriminate in favor of interLATA service providers with whom they have entered into business relationships.

The statutory provisions relied upon by the BOCs are consistent with this overall policy. Sprint and others have demonstrated that those provisions when read in context -- as they must be -- comport with the policy goals of the Act. The Commission is therefore bound to adopt that latter construction.

Indeed, the statutory arguments offered by the BOCs in support of the "teaming arrangements" fail on their own terms. First, the use of the same term ("provide") in the Section 271 line of business restrictions as was used in the MFJ line of business restrictions means that Congress intended that the decisions construing the MFJ term would apply to Section 271.

Those decisions prohibit a BOC from marketing services to which the line of business restrictions apply. Thus, until a BOC receives Section 271 approval in a state, it may not market the interLATA service of an unaffiliated carrier.

Nor do the joint marketing provisions of Section 272(g) or Section 274(c) or the FCC's implementing orders provide any further support for the BOCs' position. Section 272(g) and the FCC's implementation of that provision merely reflect that, while joint marketing is prohibited, certain teaming arrangements are permitted even under the line of business restrictions. Since the agreements at issue here include joint marketing, however, they cannot be saved by this rule. Further, Section 274, far from supporting the BOCs' arguments, demonstrates that Congress was capable, when it so wished, of explicitly authorizing BOCs to engage in joint marketing of interLATA services provided by unaffiliated entities.

Finally, the FCC's decisions regarding permissible joint marketing scripts in the Section 271 orders are inapposite. This is because these scripts apply only to a BOC that has already received Section 271 approval in a state.

DISCUSSION

I. The Marketing Arrangements Undermine The Policy Behind The Sections 271 and 272.

In determining the extent to which BOCs may participate in the business of providing in-region, interLATA services prior to receiving Section 271 approval, it is critical that the Commission keep in mind the broader policy context of the 1996 Act. U S West and Ameritech have combed the provisions of the Act and the FCC's implementing orders to find some colorable support for the proposition that the 1996 Act must be read to permit the BOCs to participate in aspects of the long distance business from which they were barred under the MFJ. As discussed below, these arguments fail even on their own terms. But just as importantly, they ignore the overarching policy behind Sections 271 and 272. For while the BOCs' literalist arguments may be plausible when considered in isolation, "textual analysis is a language game played on a field known as 'context.'"[2] As the D.C. Circuit has recognized, it is especially important that the overarching policy context inform the construction of the complex statutory provisions of Sections 271 and 272.[3]

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2 See Bell Atlantic Tel. Cos. v. FCC, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (construing subsections (a) and (e) of Section 272).

3 See SBC Communications Inc. v. FCC, 138 F.3d 410 (D.C. Cir. 1998 (upholding FCC construction of the ambiguous terms of Section 271(c)(1)(B) in light of broader policy behind Section 271); Bell Atlantic Tel. Cos. v. FCC, 131 F.3d 1044 (D.C. Cir. 1997) (upholding FCC construction of the ambiguous terms of Section 272(e)(4) in light of broader policy behind Section 272).

That context is of course very familiar to the Commission, but well worth reiterating. The Modification of Final Judgment ("MFJ"), including both the line of business restrictions and the equal access requirements, were designed to prevent the BOCs from leveraging their local monopolies to discriminate against certain unaffiliated interLATA service providers or to cross-subsidize the cost of providing interLATA services. The MFJ contemplated that at least the line of business restrictions would be eliminated if the BOCs lost their local monopolies, but it did not require the elimination of the monopolies.[4]

The 1996 Act incorporated explicitly the language and implicitly the logic of the MFJ in Section 251(g) (equal access) and Section 271(a) (the line of business restrictions). The only fundamental difference between 1996 Act on the one hand and the MFJ on the other, is that the 1996 Act requires the BOCs to open their local monopolies to competition.[5] Further, Section 271 offers the quid pro quo of in-region entry for checklist compliance (as well as public interest approval) in order to give

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[4] This was at least in part due to the fact that the elimination of local monopolies required the elimination of state laws that protected the BOCs, either implicitly or explicitly, from competitive entry into the local market. See United States v. Western Elec. Co., 900 F.2d 283, 292 (D.C. Cir. 1990) (explaining Justice Department view that "the BOCs' bottleneck monopolies persisted primarily because of local regulation"). State regulation was of course beyond the MFJ court's jurisdiction.

[5] Section 253 is intended to eliminate the problem of state legal barriers to entry.

BOCs the incentive to cooperate in lowering the barriers to entry into the local market. Such cooperation is critical since access to BOC networks on reasonable terms and conditions is essential for local competition to develop. If and when the local entry barriers are eliminated and local competition develops,[6] a BOC's incentive and the opportunity to engage in the kind of discrimination and cross-subsidy that made the interLATA restrictions in Section 271 necessary will be reduced. In-region, interLATA entry would then be justified.

The benefits of this structure, if conscientiously implemented, are substantial. They include the social welfare benefits of a truly competitive local market and the reduced role of regulation. On the other hand, to allow the BOCs into the in-region business prematurely by permitting them to establish brand identification as providers of bundled local and long distance offerings would reduce their incentive to cooperate in lowering local entry barriers. It would also give them the opportunity to discriminate in favor of interLATA providers with whom they have entered into joint-marketing relationships.

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6 While "Track B" provides an exception to the general rule that facilities-based competition must develop before Section 271 approval will be granted, the FCC has found (a finding approved by the D.C. Circuit) that Track B is merely a narrow exception to the general policy in favor of facilities-based competition. See Application of SBC Communications, Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services In Oklahoma, Memorandum Opinion and Order, 12 FCC Rcd 8685 (1997) *aff'd* SBC Communications Inc. v. FCC, 138 F.3d 410 (D.C. Cir. 1998).

The BOCs would have the Commission infer from the largely ambiguous language of certain subsections of the 1996 Act that Congress intended a substantial modification of this policy approach. Sprint submits that Congress is fully capable of explicitly describing its intention to abandon fundamental legal and regulatory policy. Moreover, as Sprint and other parties to this proceeding have explained at length, the provisions that U S West and Ameritech have unearthed as supporting their joint marketing arrangements with Qwest are inconsistent with the overarching policy of withholding interLATA entry until a BOC's stranglehold on the local monopoly has been loosened. In the absence of specific language to the contrary, it is only logical and sound policy for the FCC to adopt the interpretations that comport with this policy.

II. The BOCs' Marketing Arrangements Violate The Terms Of the Act And The FCC's Orders.

In attempting to argue that it is (or "can be")[7] permissible for a BOC to market in-region, interLATA services of a particular carrier prior to Commission approval under Section 271, the RBOCs repeatedly distort and misconstrue Sprint's Petition, the relevant MFJ precedents, applicable statutory

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[7] See U S West Comments at 19, which urges the FCC to determine only that "the marketing by a BOC of the long distance services of an unaffiliated IXC can be consistent with Sections 271 and 251(g) of the 1996 Act" [emphasis added]; SBC Comments at 8, and requests a ruling that "marketing and sales activities related to interLATA service of an unaffiliated provider do not per se constitute the provision of the underlying interLATA service." [emphasis added]

provisions, and the Commission's own decisions implementing Section 271 and other provisions of the Telecommunications Act of 1996. The arguments advanced by the RBOCs have been generally refuted by the other commenters in their submissions to the Commission and in related court filings appended to the comments submitted by AT&T and ALTS. Sprint thus limits its reply comments to address and correct certain specific distortions and mischaracterizations reflected in the RBOCs' comments.

A. The MFJ's Construction of the Term "Provide" Is Controlling Here.

BellSouth misrepresents Sprint's Petition and misstates the applicable statutory language, asserting that "Sprint correctly cites 47 U.S.C. § 271 as prohibiting a BOC, subject to defined exceptions set forth in § 271(g), from 'provisioning interLATA services' until it has received authority from the FCC to do so."[8] Of course, Section 271(a), the subsection cited in Sprint's Petition and misquoted in BellSouth's comments, in fact states that "[n]either a [BOC] nor any affiliate of a [BOC] may provide interLATA services except as provided in this section."[9] BellSouth then tries to utilize this misstatement of the statutory language to avoid the MFJ court's construction of the term "provide," and urges the Commission instead to adopt a

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8 BellSouth Comments at 4 (emphasis added).

9 47 U.S.C. § 271(a).

different and significantly narrower construction of the Section 271(a) prohibition.[10]

As the cases cited by Sprint and the other non-BOC parties indicate, the term actually used in the statute (i.e., "provide") was consistently construed for purposes of the MFJ line of business restrictions, including the BOC interLATA services prohibition, as "synonymous with furnishing, marketing, or selling."[11] Indeed, at least one of the original seven RBOCs has explicitly acknowledged to the Commission that "[u]nder the MFJ, the BOCs were also prohibited from 'marketing' long distance [i.e., interLATA] services . . . because of the MFJ's prohibition against BOC provision of interexchange services."[12] The Commission should reject the attempt by certain of the RBOCs[13] to construe Section 271(a) without reference to the construction of

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10 See BellSouth Comments at 5, asserting that "[a] BOC may enter into teaming arrangements to market and sell the interLATA services of an IXC, so long as it "enters the arrangement on an equal access basis and does not provision the interLATA service." [emphasis added]

11 United States v. Western Electric Co., 675 F. Supp. 655, 665-666, n.46 (1987). Sprint further notes that U S WEST's attempt (U S West Comments at 6, n.9) to mischaracterize the MFJ court's Shared Tenant Services decision, cited in Sprint's Petition, is wholly at odds with the court's opinion in that case, which clearly identified "marketing" as a prohibited interLATA function. See United States v. Western Electric Co., 627 F. Supp. 1090, 1101 (1986).

12 Letter from Susanne Guyer, Executive Director - Federal Regulatory Policy Issues, NYNEX, to William F. Caton, Acting Secretary, FCC, CC Docket No. 96-149, at 2-3 (October 23, 1996).

the identical term "provide" adopted by the courts under the MFJ.[14]

So long as the services which a BOC seeks to market constitute "interLATA services," as defined in the 1996 Act, and do not fall within one of the exceptions established elsewhere in Section 271, the only remaining question is whether the term "provide" includes marketing, as it did under the MFJ.[15]

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[14] In discussing the alarm monitoring prohibition contained in Section 275 and the purported applicability of the Commission's reading of that provision to its construction of the Section 271 interLATA prohibition, SBC argues that the proper construction of the Section 271 interLATA prohibition "turns on the meaning of 'provision' of the prohibited service." SBC Comments at 5, n.3. Sprint does not agree with SBC's contention that the FCC's decisions interpreting Section 275 should govern the Commission's construction of the term "provide," as used in Section 271(a). Even if one assumes that Section 275 was properly construed by the Commission as prohibiting some, but not all BOC marketing arrangements, the language and history of this section of the statute plainly differs from that of Section 271(a). Indeed, the Commission itself quite properly has concluded that "the types of [marketing] agreements a BOC may enter into with alarm monitoring companies are not necessarily determinative of the types of agreements, if any, they may enter into with long distance companies under Section 271." Memorandum of Federal Communications Commission as Amicus Curiae in Support of Primary Jurisdiction referral, AT&T Corp. et al. v. Ameritech Corp., No. 98 C 2993 (N.D. Ill.), filed June 5, 1998 ("FCC Illinois Amicus Brief") at 9. See Memorandum of Federal Communications Commission as Amicus Curiae in Support of Primary Jurisdiction referral, AT&T Corp. et al. v. U S WEST Communications, Inc., No. C98-634 WD ("FCC Washington Amicus Brief") at 8 (same)

[15] In this regard, the arguments advanced by U S WEST and SBC in their comments (U S West Comments at 5-6; SBC Comments at 3-4), based on their analysis of the definition of "interLATA services" adopted in the 1996 Act, are wholly irrelevant, since it is clear that the Qwest services which U S WEST and Ameritech have contracted to market fall squarely within the statutory definition.

As the plaintiffs in the pending court and complaint proceedings have correctly observed, when Congress adopts a new law incorporating portions of a prior law, "Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."[16] Such a presumption is "particularly appropriate," in instances where Congress has exhibited both a "detailed knowledge" of the subject provisions and "a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation."[17] In adopting Section 271, Congress included general prohibitory language incorporating the exact same term (i.e., "provide") used under the MFJ, and identified several express "exceptions" to the general prohibition, thereby eliminating those aspects of the MFJ interLATA prohibition which it "regarded as undesirable or inappropriate." Accordingly, the Commission must presume that Congress intended the term "provide," which it chose not to define, to be construed in a manner consistent with the interpretation given to this term under the MFJ.

B. The Statutory References to Joint Marketing Elsewhere in the Act Do Not Provide a Surprise Back Door for InterLATA Entry.

The RBOCs also argue that certain other statutory provisions, and/or Commission interpretations thereof, indicate

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16 Lorillard v. Pons, 434 U.S. 575, 581 (1978).

17 Id.

that they may enter into marketing agreements with unaffiliated providers of interLATA services within the RBOCs' home regions.[18] Plaintiffs' filings in the pending litigation effectively refute the RBOCs' contention that the joint marketing provisions of Section 272(g) (which addresses the scope of BOC-272 affiliate joint marketing activities) or Section 274(c) (which addresses the scope of BOC joint marketing and teaming activities with affiliated and unaffiliated providers of electronic publishing) afford a viable basis for concluding that Congress intended to permit such arrangements.[19] Even if the prohibitory language employed in Section 274 was identical to that used in Section 271 and in the MFJ interLATA line of business restriction (and it is not),[20] Section 274(c)(2)(A) shows that where Congress wished to authorize BOCs to engage in marketing activities for unaffiliated entities, it did so explicitly. The Commission cannot assume that Congress would abandon established MFJ precedent through stealth. Nor is there any valid basis for concluding that Section 272(g)(2) was intended by Congress to authorize the BOCs sub silentio to engage in such activities for unaffiliated IXCs.[21]

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18 See U S West Comments at 7-9; SBC Comments at 5-7; BellSouth Comments at 4-5.

19 See Plaintiff's Memorandum at 22-25.

20 Compare 47 U.S.C. § 274(a) with 47 U.S.C. § 271(a) and MFJ, Section II(D)(1).

21 Id. at 24-25.

Moreover, in its amicus briefs in the pending litigation, the FCC has made clear that contrary to the RBOCs' representations to the court, the Commission "did not give blanket approval to all marketing agreements between BOCs and unaffiliated IXCs" in addressing Section 272(g)(2) in its Non-Accounting Safeguards Order.[22] Indeed, in that proceeding, U S WEST itself took the position that Section 272(g)(2) "does not address at all what a BOC may or may not do with respect to services provided by unaffiliated IXCs."[23]

The Commission's remarks with respect to "teaming" arrangements in Paragraph 293 of its Non-Accounting Safeguards Order were made in response to the BOCs' assertion "that they are not prohibited from aligning -- also known as 'teaming' -- with a non-affiliate that provides interLATA services and marketing their respective services to the same customers prior to receiving interLATA authority under Section 271."[24] Teaming arrangements of this sort, i.e., those which do not involve BOC marketing of interLATA services or other activities which fall within the scope of the MFJ interLATA prohibition (as construed

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22 See FCC Illinois Amicus Brief at 8-9 [emphasis added], citing the Commission's statements concerning "teaming arrangements" in Non-Accounting Safeguards of Sections 271 and 272 of the Act, 11 FCC Rcd 21905 at ¶ 293 (1997); FCC Washington Amicus Brief at 7.

23 Reply Comments of U S West, CC Docket No. 96-149, at 18 (filed August 30, 1996).

24 Non-Accounting Safeguards Order, at ¶ 289 [emphasis added], citing NYNEX Reply at 15-16.

by the courts) and which do not violate the BOCs' equal access and non-discrimination obligations have of course been permitted both before and after enactment of the 1996 Act.[25]

In its order, the Commission concluded that "section 272(g) is silent with respect to the question of whether a BOC may align itself with an unaffiliated entity to provide interLATA services prior to receiving Section 271 approval," observing (correctly) that "the language of section 272(g) only restricts the BOC's ability to market or sell interLATA services 'provided by an affiliate required by [Section 272].'"[26] However, the Commission went on to caution that "any equal access arrangement pertaining to 'teaming activities' that were imposed by the MFJ remain in effect" during the period prior to the BOC's receipt of

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25 See Response of the United States to Ameritech's Request for Clarification and Waiver of the Decree Regarding the Offering of Shared Communications and Related Services to Tenants, United States v. Western Electric, Civ. No. 82-0192 (filed August 27, 1984) at 30, observing that BOCs "can participate" in shared tenant services arrangements by "'teaming' with an entity having no decree restriction so long as the arrangement clearly limits the BOC's participation to the provision of CPE and exchange services." [emphasis added]

Sprint's acknowledgment, in its Petition, that not all teaming arrangements are proscribed by Section 271 (Sprint Petition at 8) applies to this type of arrangement. Sprint has not conceded (as U S WEST erroneously suggests) and does not concede that Section 271(a) permits "teaming" arrangements in which the BOC itself is involved in marketing the in-region interLATA services of unaffiliated IXCs prior to its receipt of Section 271 approval. See U S West Comments at 10.

26 Id. at ¶ 296. [Emphasis added]

Section 271 authorization.[27] When read in context, then, it seems clear that the Commission's discussion of "teaming arrangements," rather than sanctioning BOC marketing of interLATA services prior to Section 271 approval, merely reflects a recognition that arrangements of the sort which were permitted under the MFJ (i.e., those which did not involve prohibited BOC marketing activities) would remain subject to the constraints imposed by the BOCs' equal access and non-discrimination obligations under Section 251(g).

C. The FCC Rulings on Joint Marketing Post-Section 271 Approval Are Inapposite.

Finally, U S WEST attempts to defend its interLATA marketing arrangement by invoking the Commission's discussion of post-Section 271 approval BOC joint marketing in the BellSouth South Carolina Order.[28] As the FCC amicus filings in the pending District Court proceedings make clear, the Commission's discussion of permissible telemarketing activities in Paragraphs 236-239 of its order "presupposed that a BOC had previously obtained approval to enter the long distance [i.e., in-region interLATA] market."[29] As the order itself makes clear, the FCC's

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27 Id.

28 See U S West Comments at 10, n.21, citing Application of BellSouth Corporation et al. Pursuant to Section 271 of the Communications Act, as amended, to Provide In-Region, InterLATA Services in South Carolina, 13 FCC Rcd 539, at ¶ 238 (1997) ("BellSouth South Carolina Order").

29 FCC Illinois Amicus Brief at 9; FCC Washington Amicus Brief at 8.

discussion of BOC telemarketing activities was designed to ensure an appropriate balance between the BOCs' Section 251(g) equal access obligations, which were adopted "at a time when BOCs could not provide (and therefore could not market) [interLATA] services," and the BOCs' rights under Section 272(g) of the Act,[30] which allows a BOC to engage in joint marketing of in-region interLATA services only after it has been "authorized to provide interLATA service in such state under Section 271(d)."[31] Accordingly, the Commission's order provides no support whatsoever for the proposition that Section 271 permits a BOC to jointly market a package of local and long distance services, including interLATA services, prior to its receipt of Commission approval pursuant to Section 273(d).[32] Nor can it be construed as altering the nature and scope of the BOCs' existing equal access and non-discrimination obligations under Section 251(g) with respect to any "teaming arrangements" or other marketing activities which they may be permitted to undertake, consistent with Section 271(a), prior to fulfilling the market-opening

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30 BellSouth South Carolina Order, at ¶¶ 237-238. [emphasis added]

31 47 U.S.C. § 272(g)(2).

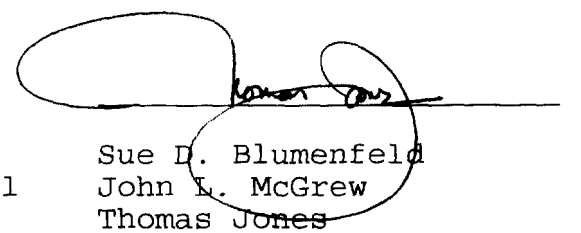
32 See FCC Illinois Amicus Brief at 9 ("The Commission's remarks . . . concerning BOC telemarketing scripts . . . do not address the issue before the Court. . . ."); FCC Washington Amicus Brief at 8 (same).

conditions precedent to Commission approval under Section 271(d).[33]

CONCLUSION

For the reasons explained above, the Commission should find that the "teaming" agreements entered into between U S West and Qwest and Ameritech and Qwest violate both Section 251(g) and Section 271(a) of the Communications Act.*

Respectfully submitted,



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* Electronic filing submitted via 3.5" diskette to Janice Myles, Common Carrier Bureau.

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33 See FCC Non-Accounting Safeguards Order at 22047, ¶ 293 ("[A]ny equal access requirements pertaining to 'teaming' activities that were imposed by the MFJ remain in effect until the BOC receives Section 271 authorization.")..

CERTIFICATE OF SERVICE

I, Catherine M. DeAngelis, do hereby certify that on this 19th day of June, 1998, copies of the foregoing "Reply Comments and Opposition of Sprint Communications Company, LP" were hand delivered or sent by First Class Mail, postage prepaid, to the following parties:

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